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No. 05-1312

In the Supreme Court of the United States

BOZO KELAVA,

Petitioner,

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government's opposition does not deny that this retroactivity issue presents a "recurring question" of "great importance" (Pet. 19, 20), or that it has generated "substantial confusion" among the courts of appeals (Pet. 8). Nor does the government's opposition raise any doubt that there is an undeniable three-way split of authority over whether reliance is the *sine qua non* of impermissible retroactivity. Compare, *e.g.*, *Olatunji* v. *Ashcroft*, 387 F.3d 383 (4th Cir. 2004) (Luttig, J.) (reliance not required), with *Ponnapula* v. *Ashcroft*, 373 F.3d 480 (3d Cir. 2004) (Becker, J.) (reasonable, but not subjective, reliance required), with Pet. App. 8a (acknowledging the split of authority and requiring both reasonable *and* subjective reliance). Nor, finally, does the government contend that this split might resolve itself, a point made indisputably clear by *Thom* v. *Ashcroft*, 369 F.3d 158 (2d Cir. 2004) (Calabresi, J.), which held that reliance is essential to the retroactivity inquiry, although a *majority* of that Second Circuit panel would have come out the opposite way in the absence of prior circuit precedent. See Pet. 14-16.

The government simply has no response to the crux of petitioner's argument. Instead, the government goes for the capillaries, asserting that the pertinent circuit holdings are somehow "dict[a]" (an assertion belied by the plain language of the relevant opinions); that, because the conflicting decisions did not address the same subsection of the same statute, the conflict is somehow not squarely presented (a virtual *non sequitur*, given that the split arises where the retroactivity canon is *defined*, not where it is *applied*); and that, because reliance is required by the retroactivity analysis, this Court need not grant review to actually *decide* whether reliance is required by the retroactivity analysis – a question-begging response better suited for merits briefing.

None of the government's arguments refutes the central

point of the petition: the sharp divide over whether reliance is a necessary component of the retroactivity analysis. It is on this point that the Ninth Circuit's decision squarely conflicts with decisions of this Court and other federal circuits. This Court should grant review to resolve that conflict for "the plethora of cases that have inundated our Circuit and our sister Circuits" and finally end the "burdensome and protracted litigation" that this conflict has produced. *Brooks* v. *Ashcroft*, 283 F.3d 1268, 1275 n.7 (11th Cir. 2002).

1. The government makes no serious attempt to address the clear split in authority identified in the petition. Instead, it attempts to confuse matters by characterizing the pertinent holdings of the Third and Fourth Circuits as "dictum" (Opp. 11, 12), but this ignores what those opinions actually say.

a. In his majority opinion announcing that the Fourth Circuit will not require reliance in applying the anti-retroactivity canon, Judge Luttig stated unequivocally: "we *hold* that reliance (whether subjective or objective) is not a requirement of impermissible retroactivity." *Olatunji*, 387 F.3d at 388 (emphasis added). Having so held, the Fourth Circuit then reasoned that "IIRIRA is impermissibly retroactive because it indisputably attached new legal consequences" to an alien's pre-enactment conduct, which alone entitled him to relief without proving any "form of reliance" (*id.* at 389, 396). Accordingly, the issue here – the role of reliance in the retroactivity framework – was properly presented and decided in *Olatunji*, and the Fourth Circuit resolved it by reaching precisely the opposite conclusion that the Ninth Circuit reached below. See Pet. App. 8a, 11a.

The government gamely attempts to cabin *Olatunji*'s unqualified holding as dicta, saying that the panel "observed" that "reasonable reliance existed in the circumstances of that case." Opp. 12 (citing *Olatunji*, 387 F.3d at 396). The government has mistaken a hypothetical for a holding. *Olatunji* did indeed "observe" that "*[i]f* some form of reliance *were* understood as required," the court "would insist at most

upon objectively reasonable reliance" (387 F.3d at 396) – a counterfactual statement that plainly *holds* nothing. But even if that statement were construed as an alternative holding, the government would have established, at most, that *Olatunji* "rests on two or more grounds," which under settled law relegates neither holding "to the category of *obiter dictum*." *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949).

b. In *Ponnapula* v. *Ashcroft*, 373 F.3d 480 (3d Cir. 2004), Judge Becker, writing for the court, also squarely confronted and decided the reliance aspect of the retroactive impact of § 212(c)'s repeal. 373 F.3d at 494. The court characterized the question before it as "what aliens – if any – who went to trial and were convicted did so in reasonable [not *actual*] reliance on the availability of § 212(c) relief." *Ibid.* In holding that Ponnapula had proved impermissible retroactivity and thus was entitled to relief, the court acknowledged that it was "approaching the issue in this case from the first principles * * * and *rejecting the actual-reliance approach of our sister Courts of Appeals*." *Id.* at 501. Despite its protestations to the contrary, the government actually acknowledges that this holding cannot reasonably be called *dicta*: *Ponnapula*, argues the government, "reject[ed] the suggestion that a particular alien must demonstrate 'actual [i.e. subjective] reliance' on the pre-existing law," and instead "grounded its holding in its conclusion that aliens must prove "'*reasonable reliance* on the availability of [discretionary] relief.'" Opp. 11.

2. Perhaps realizing that it cannot reasonably dispute the presence of this circuit split, the government attempts to reframe the question at a level of generality more hospitable to its argument against certiorari. Specifically, the government suggests that the split is not real because the purportedly conflicting cases addressed different subsections of IIRIRA. Opp. 10-11. Thus, says the government, if there is a circuit split, it is only about an "abstract" retroactivity issue that this Court need not bother to address. Opp. 11.

The government's artful attempt to recast the question

presented fails even on its own terms, however, as the "abstract" issue of reliance is *precisely* where the conflict lies in each conflicting circuit. That those circuits addressed different provisions of IIRIRA is wholly beside the point. Those cases determined "the framework that * * * governs the retroactivity determination" (387 F.3d at 395), and the split arises at the level where the anti-retroactivity canon is *defined*, not where it is *applied*. Change the definition, and the result in each circuit must change – regardless of the particular IIRIRA provision at issue. After *Olatunji*, for example, the Fourth Circuit cannot require reliance in proving impermissible retroactivity – and that holding would apply both to the statutory provisions at issue in that case and here – whereas the Ninth Circuit still holds the opposite. Cf., *e.g.*, *Dinnall* v. *Gonzales*, 421 F.3d 247, 261 n.15 (3d Cir. 2005) (finding itself "bound by *Ponnapula*" and its requirement of "reasonable reliance," even though the two cases addressed different statutory provisions). This *dispositive* issue is not "abstract" in any sense of the word. See Pet. 21-22.

3. The government also contends (at 11) that *Olatunji* "fails to assist petitioner" because his "ineligibility does not result from his *conviction* for engaging in terrorist activity," but rather "his having *engaged in* such activity." That argument begs the question presented. Because only a decision to enter a plea agreement – not to engage in the underlying conduct – could give rise to a plausible reliance interest, the government's distinction matters only if one assumes that *reliance matters* – which is the very issue in this case.[1]

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[1] The government (at 10) incorrectly characterizes *Olatunji* as having found impermissible retroactivity because the alien had *pled* guilty, not because the *conduct* underlying his plea preceded IIRIRA's effective date. The Fourth Circuit's opinion was clear on this point: "Olatunji does not claim that IIRIRA affected the particular *terms* of his agreement or deprived him of consideration obtained during the bargaining process; rather, he claims IIRIRA has attached new legal consequences to the *conviction* that resulted from his plea." 387 F.3d at 396.

Nor is the government correct that "the courts of appeals have uniformly rejected the notion" that IIRIRA's repeal is impermissibly retroactive "merely because an alien *committed* (as opposed to pleaded guilty to) an aggravated felony before IIRIRA." Opp. 8-9. The government fails to mention that, with one exception, those cases follow the Ninth Circuit's approach requiring reliance in order to prove impermissible retroactivity. See Pet. 11 n.4.[2] Those cases thus held *not* that the new law failed to attach a new disability to pre-enactment events, but that the failure to show reliance *in addition to* the new disability made the retroactive application permissible. That is precisely what the circuit split in this case is about.

4. The government also attempts to downplay the circuit split by positing that even if "*Ponnapula* or *Olatunji* could be said to suggest a different understanding from that of the court of appeals below," petitioner would not have been entitled to relief in those circuits – and thus this case is an improper vehicle to address the retroactivity question. Opp. 12. A glance at the case law shows the flaws in that assertion.

a. The government is plainly wrong that petitioner would not have been entitled to relief under *Olatunji*. Because the decision below turned *exclusively* on petitioner's failure to demonstrate reliance on the prior state of the law (Pet. App. 8a), it makes little sense to assert that petitioner would not prevail under a standard that would eliminate the very legal obstacle that denied him relief. *Olatunji*, 387 F.3d at 391.

Perhaps aware of this problem, the government attempts to distract this Court from *Olatunji*'s clear holding by instead citing the Fourth Circuit's *earlier decision* in *Chambers* v. *Reno*, 307 F.3d 284 (4th Cir. 2002). But *Olatunji* expressly contemplated and rejected the exact argument that the government presses here. Chambers' claim, the *Olatunji*

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[2] *Chambers* v. *Reno*, 307 F.3d 284 (4th Cir. 2002), the sole exception, is discussed at pp. 5-6, *infra*.

court explained, failed not because he could not prove reliance, but because he "did not even fall under the Justice Story retroactivity framework." 387 F.3d at 392 (Chambers' asserted "relevant past conduct" was not his past *criminal* conduct, but rather his "'*decision to go to trial*,'" which itself "did not render him deportable or subject him to certain deportation, regardless of whether pre- or post-IIRIRA law applied'"); *ibid.* (rejecting the *dissent's* theory that *Chambers* held "reliance *is* required" in the retroactivity inquiry).

The government's argument also conflicts with an unbroken line of Fourth Circuit precedent refusing to hold that failure to prove reliance will bar a claim of impermissible retroactivity. See *Velasquez-Gabriel* v. *Crocetti*, 263 F.3d 102, 109 (4th Cir. 2001) (noting, in dicta, that the lack of "detrimental[] rel[iance] on prior law may not * * * foreclose a claim that § 241(a)(5) * * * operates retroactively," and explaining that *Hughes Aircraft* held "that the amended False Claims Act operated retroactively without discussing whether any party detrimentally relied on previous law"). The government simply cannot show that, had petitioner's appeal arisen in the Fourth Circuit, the result would not have been different. That is the definition of a circuit split.

b. Again downplaying the conflict between the result below and the Third Circuit, the government resorts to attacking a straw man. The government argues (at 12) that because petitioner could not satisfy *Ponnapula*'s "reasonable reliance" requirement, there is no conflict between that case and the decision below. But no one averred otherwise. The Third Circuit's retroactivity framework is relevant not because it would have granted petitioner relief, but because it conflicts with those of the Fourth Circuit (requiring no reliance) and the Ninth Circuit (requiring reasonable *and* subjective reliance). That, again, is the definition of a circuit split, and that, again, underscores the need for this Court's review.

5. Because the government cannot reasonably challenge the existence or depth of this split, it instead spills much ink

arguing on the merits that reliance *is* a necessary component of the retroactivity analysis. Opp. 7-9, 11-12. According to the government, because *INS* v. *St. Cyr*, 533 U.S. 289 (2001), found a retroactive effect upon a showing of reasonable reliance, *every* retroactive effect must now include a showing of reliance. Opp. 8 (petitioner must prove that "[his] decision to engage in terrorist activity" was "made in reliance" on prior law). This argument mirrors the confusion among the lower courts over reliance's role in the retroactivity inquiry, and thus only underscores the need for this Court's review.

First, in asserting that *St. Cyr* has "reaffirmed the significance" or "the absen[c]e" of distinct reliance interests (Opp. 11), the government over-extends *St. Cyr*. That case "did not purport to add a subjective reliance requirement," but rather "applied *Landgraf* to a set of facts that indicated 'an *obvious and severe* retroactive effect.'" *Olatunji*, 387 F.3d at 393 (quoting *St. Cyr*, 533 U.S. at 325); see also *Ponnapula*, 373 F.3d at 499 (same). As petitioner explained (at 18-19) – and the government ignored – the Court's decision to illustrate the effects of impermissible retroactivity by *pointing to* reliance does not suggest that it was *requiring* reliance as a threshold matter. Indeed, because *St. Cyr* found reasonable reliance on its facts, it did not need to reach out and decide if the *absence* of reliance would have defeated the alien's claim.

Second, the government's argument cannot be reconciled with *St. Cyr*'s plain language. Rather than holding (as the government apparently believes it did) that *St. Cyr* introduced an exclusive "reliance" standard, the Court approvingly quoted Justice Story's standard – which does *not* require reliance – and affirmed that even it "'does not purport to define the outer limit of impermissible retroactivity.'" 533 U.S. at 321 n.46 (Justice Story's standard "simply describes several '*sufficient*,' as opposed to '*necessary*,' conditions" for proving retroactivity). The government and the court below thus plainly err in believing that *St. Cyr* transformed reliance

from a sufficient condition into a necessary one. Pet. 18-19.[3]

Moreover, the government notably fails even to address petitioner's showing that this Court has repeatedly defined and applied the anti-retroactivity canon without mentioning reliance, see Pet. 16-17 & n.7 (quoting Justice Story's test and citing five other formulations that fail to mention reliance) – and has done so even where the facts showed the parties had likely *not* relied on the prior state of the law, see Pet. 12-13, 15, 18 (explaining that *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939 (1997), *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 309 (1994), and *Landgraf* v. *USI Film Prods.*, 511 U.S. 244 (1994), each found impermissible retroactivity on a showing of retroactive *effects*, not reliance).

The decision below sharply departs from this Court's precedent and conflicts with Third and Fourth Circuit decisions that reject the government's overreading of *St. Cyr*. This case squarely presents an opportunity to resolve the deep division among the circuits on this important question.

6. The government asserts that this Court's decision in *Fernandez-Vargas* v. *Gonzales*, 126 S. Ct. 2422 (2006), somehow "confirmed that reliance interests are relevant to the inquiry." Opp. 12. But in *Fernandez-Vargas*, the statute at issue was not retrospective in nature, but entirely *prospective*. This Court stated in plain terms that the alien was being punished not for "a past act that he is helpless to undo up to the moment the Government finds him out," but for "his choice to continue his illegal presence, after illegal reentry

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[3] While the government is correct that retroactivity analysis may be "informed by 'considerations of fair notice, *reasonable reliance*, and settled expectations'" (Opp. 11), such considerations are used only as "sound guidance" in "hard cases" (*Landgraf*, 511 U.S. at 270). They are largely irrelevant where, as here, a law indisputably "attaches new legal consequences to events completed before its enactment." *Id.* at 270.

and after the effective date of the new law." *Id.* at 2432.[4]

To the extent that *Fernandez-Vargas* relates to the question presented, it rejects the *government's* position. It explicitly stated that the anti-retroactivity canon "is meant to avoid new burdens imposed on completed acts" (*id.* at 2433), and that "[t]he modern law thus follows Justice Story's definition of a retroactive statute, as * * * 'attach[ing] a new disability, in respect to transactions or considerations already past" (*id.* at 2428) – a rule that does *not* require reliance (*e.g.*, *Olatunji*, 387 F.3d at 391). *Fernandez-Vargas* thus does more than fail to support the government's argument – it contradicts it.[5]

7. In contending that the decision below is consistent with this Court's decision in *Clark* v. *Martinez*, 543 U.S. 371 (2005), the government asserts that petitioner's argument "reflects a fundamental misunderstanding of this Court's retroactivity decisions" (Opp. 13). But it is the government that repeats the critical errors the Ninth Circuit made below.

The government readily adopts the Ninth Circuit's position that a provision may be construed to reach "persons as to whom its application would produce no retroactive effect," but still construed to avoid "persons as to whom there would be a retroactive effect." Opp. 14. This, however, is the very position rejected in *Clark*: "If one [construction] would raise a multitude of constitutional problems, the other should prevail – whether or not those constitutional problems pertain to the particular litigant before the Court." 543 U.S. at 380-81. The government's position leads inexorably to "the

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[4] This also proves that *Fernandez-Vargas* does not cast doubt on *Olatunji*. Opp. 11-12. As this Court addressed a *prospective* application of IIRIRA, it could not define reliance's role in the retroactivity inquiry.

[5] Petitioner previously suggested that the Court might consider holding this petition pending the resolution of *Fernandez-Vargas*. Pet. 22-23. But because *Fernandez-Vargas* had no occasion to resolve the confusion over the role of reliance in the retroactivity inquiry, there is no need to grant the petition, vacate the judgment, and remand in light of that decision.

dangerous principle that judges can give the same statutory text different meanings in different cases." *Id.* at 386.

The government also ignores that "the proper temporal reach of statutes" is a "fundamental policy judgment[]" allocated to Congress, not the courts. *Landgraf*, 511 U.S. at 273. The government is therefore wrong to endorse the notion that Congress delegates to the courts the task of prescribing the temporal scope of ambiguous statutes; to hold otherwise, "in the face of complete congressional silence, is nothing but judicial legislation." *Olatunji*, 387 F.3d at 394.

To the extent the government reads *Fernandez-Vargas* to command such a case-by-case approach with its suggestion to "construe[] [a retroactive] statute as inapplicable *to the event or act in question*," 126 S. Ct. at 2428, the government has "mistake[n] the reservation of a question with its answer." *Clark*, 543 U.S. at 378. Because the statutory text in the instant case "provides for no distinction" between different classes of aliens, *id.* at 379, its meaning is not "subject to change depending on the presence or absence of [retroactivity] concerns in each individual case," *id.* at 382.

Finally, the government, like the court below, relies on *Martin* v. *Hadix*, 527 U.S. 343 (1999), to suggest that a statute can be construed to apply both prospectively and retrospectively at the same time. *Martin* endorsed no such thing. *Martin* held that the statute applied *prospectively* only – and it thus applied prospectively to *all* groups. 527 U.S. at 358. The fact that prior law still governed pre-enactment conduct hardly proved that the temporal scope of the new statute changed depending on the party before the court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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